

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 13, 2007 Session

VERA J. ROGERS v. SIDNEY DAVID ROGERS

**Direct Appeal from the Circuit Court for Blount County
No. E-20077 Hon. W. Dale Young, Circuit Judge**

No. E2005-02645-COA-R3-CV - FILED SEPTEMBER 12, 2007

In this divorce action, the wife was awarded the divorce and periodic alimony. The Trial Judge also divided the marital property. The husband appealed. We affirm the Trial Court's Judgment, as modified.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed, as Modified.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Kevin W. Shepherd, Maryville, Tennessee, for appellant.

Neill R. Monaghan, Maryville, Tennessee, for appellee.

OPINION

Vera Rogers ("wife"), filed a Complaint for Divorce against Sidney David Rogers ("husband") on April 14, 2004. The wife averred the parties were married in 1965, and had separated in September 2002, that the husband was guilty of inappropriate marital conduct, and that the parties had irreconcilable differences.

The husband answered, and filed a Counter-Complaint, charging that he was entitled to a divorce on the same grounds.

After efforts of mediation which failed, the case was tried on March 8, 2005.

The wife testified that she was 57 years old, and had been married to the husband

since she was seventeen, that the husband was in the Air Force, and that the parties traveled extensively during the husband's service in the Air Force. She testified the husband would not allow her to work outside the home during the early years of their marriage, and that the husband retired from the Air Force at the end of 1982, and went to work in the family business. She testified that later she went out to work because of the lack of income by the husband. She testified that she worked at Hill's, Kmart, and Book Rack, and testified in detail about her husband's abusive conduct.

She testified that a business owned by husband's parents was the husband's place of employment after the Air Force, that the business was never successful, and that the insurance side of the business was sold in October 2004 and that she thought that her husband received \$10,000.00 from the sale, but he told her he did not. She testified that she owned a used bookstore called Cover to Cover, that she was partners in that business with her daughter, and that they had been in business for 9 years. She testified that she now lives in a small room in the back of the store, having lived with her daughter for 6 months after she moved out of the marital residence. She testified that she earns about \$125.00 per month from the business, after the bills are paid. She testified that the business paid the rent payment on the house it was in, as well as the insurance and repairs.

She testified that she had found out in the last six months that she was diabetic, and that the husband had not paid her anything since the middle of November, when he lost his job. She testified that she had no retirement, and had a CD worth \$1,000.00. She testified regarding personalty that was her separate property.

The wife filed her individual income tax return for 2004, which showed an income from the partnership of \$1,120.00. She also filed her affidavit of monthly expenses which totaled in excess of \$2,200.00. The wife testified that she had not applied for any other jobs at Kmart or anywhere else, because those type jobs "about killed" her, and she needed to put what energy she had into the partnership business.

The husband testified that he had retired from the Air Force on January 1, 1983, and did not have a job at present, but had applications pending in the area. He testified that he was laid off on November 16 from Commercial Bank Insurance, which had purchased the family business, and that the purchaser had kept him on for a year "to slurp up all the good will they could" and then laid him off. He testified that he received total retirement benefits of \$637.47 per month. He testified that he also got \$917.00 per month from the VA as disability benefits, because he was 60% disabled. He testified that he had been drawing social security benefits since February, of \$917.00 per month, and that his total monthly income was \$2,473.47. He testified that his house payment was \$545.26 per month, and testified regarding his other expenses, and that he had a monthly shortfall.

The husband testified that he had a bachelor's degree in business, and had completed some master's courses, and he admitted that his wife was 17 when they married, and her only education since that time was to get her GED when their daughter graduated from high school.

After trial, the parties filed an Agreed Order stating the wife would sign a Quitclaim Deed divesting herself of ownership of the marital residence, and that the husband would obtain refinancing on the residence, and that an equity check would be held in escrow pending further orders of the Court.

The Trial Court then filed a Memorandum, stating that it would adopt the Proposed Findings of Fact and Conclusions of Law submitted by wife, except that the husband would be awarded the flag belonging to his father, his recliner, his tools and carvings, and pets and related items, and the wife was awarded her grandmother's china and her family's bookcase.

A Notice of Bankruptcy was then filed by the husband, and on October 31, 2005, the Court entered a Final Decree, awarding a divorce to wife, and alimony of \$1,183.50 per month (which the Decree states represents half of husband's then monthly income). The husband was ordered to pay the wife's health insurance premiums and uncovered medical expenses for one year. With respect to the debts ordered to be paid by the husband, the Decree provided that they would be considered non-dischargeable under the bankruptcy code, as part of the financial support order.

The Trial Court, responding to a Motion to Alter or Amend Judgment, found that the husband was in the military from March 1962 until December 31, 1982, for a period of twenty years and nine months, and that the parties were married on April 16, 1965, and were thus married sixteen years and eight months of the husband's military career.

The Court acknowledged that husband had relied upon the *McCarty v. McCarty*, 453 U.S. 210 (1981), for stating that the Court could not divide his military pension that was earned prior to June 1981, which would mean that the wife was only eligible to receive a portion of the husband's military pension for the last 18 months of his service. The Court found that one year after that decision, however, the USFSPA was enacted by Congress (10 U.S.C. §1408 *et seq.*), which reversed the *McCarty* decision. The Court thus held that husband's entire pension could be considered marital property, and then entered an Order overruling the Motion to Alter or Amend.

The issues presented for review are:

1. Whether the Trial Court erred in awarding fifty percent of husband's income to wife as alimony, specifically since that included the division of VA benefits?
2. Whether the Trial Court erred in ordering payment of military retirement benefits as alimony?
3. Whether the Trial Court erred in failing to award husband repayment of a loan?

The husband argues that the Trial Court erred in awarding alimony to the wife,

because the Court did not make a threshold finding that rehabilitation was not feasible, did not consider the husband's inability to pay the amount ordered, and erred in ordering half of the husband's VA benefits and military retirement benefits to be paid as alimony.

As this Court has explained:

There are no hard and fast rules for spousal support decisions. Trial courts have broad discretion to determine whether spousal support is needed and, if so, its nature, amount, and duration. Appellate courts are generally disinclined to second-guess a trial court's spousal support decision unless it is not supported by the evidence or is contrary to the public policies reflected in the applicable statutes.

Tenn. Code Ann. § 36-5-101(d)(1) reflects a preference for temporary, rehabilitative spousal support, as opposed to long-term support. The purpose of rehabilitative support is to enable the disadvantaged spouse to acquire additional job skills, education, or training that will enable him or her to be more self-sufficient. The purpose of long-term spousal support, on the other hand, is to provide support to a disadvantaged spouse who is unable to achieve some degree of self-sufficiency.

The statutory preference for rehabilitative support does not entirely displace other forms of spousal support when the facts warrant long term or more open-ended support. Trial courts have the prerogative to determine the type of spousal support that best fits the circumstances of the case and may award several different types of support in the same case when the facts warrant it.

Even though fault is a relevant consideration when setting spousal support, see Tenn. Code Ann. § 36-5-101(d)(1)(K), spousal support decisions are not intended to be punitive. The purpose of spousal support is to aid the disadvantaged spouse to become and remain self-sufficient and, when economic rehabilitation is not feasible, to mitigate the harsh economic realities of divorce. While divorced couples often lack sufficient income or assets to enable both of them to retain their pre-divorce standard of living, the obligor spouse may be able to provide some "closing in money" to enable the disadvantaged spouse to approach his or her former financial condition.

Spousal support decisions hinge on the unique facts of the case and require a careful balancing of the factors in Tenn. Code Ann. § 36-5-101(d)(1) (Supp.1997). In virtually every case, the two most important factors are the demonstrated need of the disadvantaged spouse and the obligor spouse's ability to pay.

Anderton v. Anderton, 988 S.W.2d 675, 682-683 (Tenn. Ct. App. 1998)(citations omitted).

In this case, contrary to the husband's assertions, the Trial Court expressly found that

rehabilitation of wife was not feasible, and that long term support was necessary. The evidence does not preponderate against this finding. Tenn. Code Ann. §36-5-121.

The wife's earning capacity was significantly less than the husband's, as he had a bachelor's degree plus completion of some master's courses, and the wife holds only a GED. The husband has considerably more work experience, while wife's work experience when she was in better health, was limited to low-paying retail jobs, and those only during the wife's older years. The husband did not have a job at the time of trial, but stated that he was capable of working and was looking for work. He has a steady income from his military retirement, social security benefits, and VA disability benefits.

As the Court found, the parties were married for nearly forty years, and the husband had been employed throughout the marriage, while the wife had been essentially a homemaker. Both parties had some health issues, but the husband's did not apparently affect his ability to work.

Based on the statutory factors the evidence establishes that the Trial Court properly awarded permanent alimony, as the wife's income is insignificant, compared to the husband's income of \$2,400.00 per month, which will increase upon his again becoming employed. The wife's situation is far less promising. If she abandons her business and gets a full-time job in the retail field the evidence indicates that her income would be approximately 1/3 of what the husband receives from his retirement and disability alone. Moreover, she would also lose other benefits she currently derives from her business in the way of a place to live and utilities.

The husband argues that the Trial Court basically divided his VA disability benefits with his wife, which is improper. However, he concedes the Trial Court can consider such benefits and include them in the obligor spouse's income when making an award of alimony. *See Gragg v. Gragg*, 12 S.W.3d 412 (Tenn. 2000). In this case, the Trial Court considered the amount of VA benefits the husband received each month as part of the husband's income, and made its alimony determination based on that income. We find this issue is without merit.

As to the husband's military retirement, the husband argues the Trial Court erred in considering this retirement as income for the purpose of making its alimony award. The husband argues that the Trial Court should have considered the retirement a marital asset subject to property division, and that she was only entitled to share in the portion of that retirement that accrued from June 21, 1981, to the date of husband's retirement on December 31, 1982.

As stated in Tenn. Code Ann. §36-4-121(b)(1)(B), "'Marital property' includes income from, and any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation, and the value of vested and unvested pension, vested and unvested stock option rights, retirement or other fringe benefit rights relating to employment that accrued during the period of the marriage." (Emphasis supplied). This definition includes the husband's military retirement as marital property subject to equitable division.

The Trial Court, in its Decree, states that the wife is to be paid alimony of \$1,183.50 per month, and that “[o]ne half of the Defendant’s military retirement shall be paid directly to the Plaintiff as part of said alimony.” The Court gave no explanation why it so designated the military retirement, but Tenn. Code Ann. §36-4-121 as well as other cases addressing this issue show that the military retirement should have been divided as a marital asset in the property distribution.¹ See *Towner v. Towner*, 858 S.W.2d 888 (Tenn. 1993). Accordingly, we award one-half of the military retirement to the wife, i.e., \$318.00 per month, as division of marital property.

Regarding the issue of whether the Court could award the wife a portion of the husband’s military retirement that accrued prior to June 25, 1981, the USFSPA states as follows:

Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

10 U.S.C. §1408 (c)(1)(emphasis added). Clearly, the statute does not state that only retired pay accrued after June 25, 1981, can be treated as marital, as husband asserts, but rather states that retired pay payable to a member for pay periods beginning after June 25, 1981, can be treated as marital. This Court as well as courts of other states have recognized that the USFSPA simply overrules the *McCarty* decision and returns the state of the law to what it was before, i.e. that military retirement benefits can be treated as marital or community property in a divorce, and are subject to division with the spouse. See *Towner, supra*; *Kendrick v. Kendrick*, 902 S.W.2d 918 (Tenn. Ct. App. 1994); *Eddy v. Eddy*, 710 S.W.2d 783 (Tex. Ct. App. 1986). (A review of the facts in *Towner* also makes clear that it is not just the portion that is accrued after 1981 that is divisible, as husband argues.) The Trial Court should, however, have divided this marital asset as a part of the overall property distribution, rather than awarding a portion of the same to the wife as part of the alimony award. Accordingly, the wife’s award of alimony will be reduced to \$865.50 per month, and an Order will be entered to that effect upon remand.

Finally, the husband argues that he should have received \$4,000.00 in the property distribution, representing half of the amount of a loan the wife testified was made to her business from marital funds. The wife testified that the loan had been repaid, however. The husband did not question or dispute the wife’s testimony that this loan had been repaid, and did not testify that he had

¹ In fact, the exact property distribution in this case is nearly impossible to determine, since neither the trial court nor the parties placed any values on most of the assets involved in this record. The findings and conclusions adopted by the trial court state that marital assets are being approximately equally divided, but does not otherwise set forth any figures to substantiate that the division is near equal, nor what is being included in same. Likewise, the parties did not provide this Court with a tabulation of marital assets and their distribution as required by Tenn. R. App. Ct. 7(a).

not received any part of the repayment of the loan. Thus, he failed to establish this was an “account receivable” of the marital estate, as his brief claimed.

Moreover, the husband failed to provide this Court with any tabulation of marital assets. As we have previously explained:

The rules of this Court set out specific requirements for the contents of a brief in a domestic relations case in which a party challenges a trial court's disposition of marital property. Specifically, this Court's rules provide:

In domestic relations appeals where the issues involve the amount or the disposition of the marital property, the appellant's brief shall contain in the statement of facts or in an appendix, an orderly tabulation of all marital property in a form substantially like the form attached hereto. All entries in the table as to value and to whom the property was awarded shall be accompanied by a citation to the record where the information may be found.

Tenn. R. App. Ct. 7(a). As stated in subsection (a), the Rule even provides an exemplar for the proper designation and tabulation of marital assets. In the present case, Husband failed to provide even an explanation of the marital assets at issue, much less an orderly tabulation of the marital property. Consequently, we conclude that this argument is waived.

Townsend v. Townsend, 2005 WL 3416310, (Tenn. Ct. App. 2005).

Accordingly, we find this issue to be without merit.

For the foregoing reasons, we modify the alimony awarded to the wife, and modify the division of marital property by dividing the husband's military retirement between the parties, but otherwise affirming the Trial Court's Judgment.

The cost of the appeal is assessed to Sidney David Rogers.

HERSCHEL PICKENS FRANKS, P.J.